IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1080

Polk County No. EQCE077220

City of Des Moines
Plaintiff-Appellee

vs.

Mark Ogden
Defendant-Appellant

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE ROBERT B. HANSON, DISTRICT COURT JUDGE

APPLICATION FOR FURTHER REVIEW FROM JUNE 7, 2017 DECISION OF THE IOWA COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR BY RULING THAT THE MOBILE HOME PARK LOST ITS LEGAL STATUS AS A NONCONFORMING USE?

2. DID THE COURT OF APPEALS ERR BY FAILING TO RULE THAT EQUITABLE ESTOPPEL BARS THE CITY FROM SEEKING TO ENJOIN THE USE OF THE MOBILE HOME PARK?

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STATEMENT SUPPORTING FURTHER REVIEW

This case is one of extreme importance. This case involves a city action seeking to terminate a legal nonconforming mobile home park, containing 30 mobile homes, without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and Iowa Const. Art. I, section 18. The constitutional protections afforded nonconforming uses is a critical question of constitutional law, and in this case the city seeks to push the envelope far beyond where courts have gone before. The city's asserted justification for termination of the mobile home park is that the park

is dangerous and an unsafe nuisance. Other Iowa cases have involved termination of nuisances involving single buildings. This is the first case in Iowa, and probably in the United States, where a city has sought to forcibly remove an entire residential neighborhood as an unsafe nuisance. The safety concerns asserted by the city are so common with old, grandfathered mobile home parks that this case will set an important precedent that could lead to many similar actions by cities throughout the state for removal of mobile home parks. The removal of all mobile home parks would significantly deny our poorest citizens the right to affordable housing.

Of ultimate importance are the human lives impacted. If the Court of Appeals decision is allowed to stand, 30 families will lose their homes.

BRIEF

A. HISTORICAL BACKGROUND

This is a story about a small community of 30 impoverished families. The 30 families do not have much in the way of treasure, but they have each other and they all proudly live in their own mobile homes. Most of the residents are Latinos who do not speak English. The small community has remained unchanged for 77 years. The residents do not bother the other people living outside their neighborhood, and the people living nearby do not bother the residents. Everything is good. No one has any complaints.

The City of Des Moines could not leave well enough alone. The City filed this lawsuit demanding that the families surrender their homes and get out of the neighborhood that they had lived in during the past 77 years. Why would the City do such a terrible thing? Believe it or not, the City contends that it is doing it for the good of the residents. The City contends that after 77 years the residents have made their neighborhood too congested and that they should be kicked out for their own good. While the residents own their own mobile homes, they cannot afford to move and relocate them. The City has offered them no financial assistance. Equally as deplorable as the actions by the City is the June 7, 2017 decision by the Court of Appeals to approve the actions of the City.

In the Appellant's Brief, I quoted a passage from the Prologue to the classic 1947 book *Invisible Man* by Ralph Ellison, Second Vintage International Edition, Vintage Books, March 1995, www.vintagebooks.com. I read the book as an assignment in my journalism class at Iowa State University in 1970. Obviously, the observations and teachings of Mr. Ellison have remained with me for the past 47 years. The central thesis of Mr. Ellison is that the poor and disenfranchised are "***invisible***" in the eyes of the courts and other privileged institutions who control our society. It is as if

these human beings do not even exist, as if their bodies have no shape or substance, as if they have no human conscience or feeling.

In my opinion, the Court of Appeals Opinion evidences a shocking absence of empathy and compassion on the part of the authors, and conclusively demonstrates that the Mobile Home Park owner Mark Ogden and the poor and disenfranchised owners and residents of the 30 mobile homes are ***truly and absolutely invisible*** in the eyes of the Court.

B. UNDER THE CONSTITUTION, THE POOR ARE ENTITLED TO THE SAME STANDARD OF PROTECTION AS THE RICH.

The Bible contains the following verse: "And the King shall answer and say unto them, Verily I say unto you, inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me." King James Bible, Matthew 25:40. This simple verse is among the most powerful moral teachings ever stated. These teachings are so powerful because they are universal moral teachings found in all the world's religions. As human beings, we are all compelled to respect, honor and care for those human beings who are living in poverty and deprivation.

The protection, ***and advancement***, of the rights of human beings who are living in poverty and deprivation is commanded by our Declaration of

Independence, in which it is stated: "We hold these truths to be self-evident, that ***all men are created equal***, that they are endowed by their Creator with certain ***unalienable Rights***, that among these are Life, Liberty and the ***pursuit of Happiness***."

The use of the term "Happiness" is particularly telling. To a large extent, the Bill of Rights is focused on protecting the happiness of every citizen, rich and poor. Constitutional Due Process and Equal Protection standards protect our poorest and most vulnerable citizens from loss of their rights and property to actions by the empowered majority.

In the area of property law, the doctrine of the grandfathering of nonconforming uses has become a well-established protection against acts by the government to unconstitutionally take property away from citizens without paying just compensation.

C. WHY IS IT SO IMPORTANT FOR THE COURTS TO ZEALOUSLY SAFEGUARD THE GRANDFATHERING OF NONCONFORMING USES?

Nonconforming use rights developed to assure that property owners are not subject to unconstitutional takings of private property rights without due process and just compensation. Municipal restrictions may not deprive the owner of substantial use of property without due process. *See* U.S.

Const. Fifth Amend., section 1; Iowa Const. Art. I, section 18. Under the Fifth Amendment to the U.S. Constitution, private property may not be taken for public use, without just compensation. The "just compensation" clause is made applicable to the states by the Fourteenth Amendment. *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418 (Iowa 1996).

A constitutional "taking" is not limited to appropriation of fee title to private property; the right to just compensation also may be triggered by a regulatory "taking" that deprives a property owner of the substantial use of his property. *Id.* at 431. For example, an owner could be making productive use of a parcel, prior to city enactment of a regulation that prohibits productive use. The enactment of the new regulation would deprive the owner of use of his property, so as to entitle him to just compensation. To avoid an unconstitutional taking, the nonconforming use doctrine has developed.

"A nonconforming use is a use which not only does not conform to the general regulation or restriction governing a zoned area but which lawfully existed at the time that the regulation or restriction went into effect and has continued to exist without legal abandonment since that time." *Id.* at 430. "The prior use of the property essentially establishes a ***vested right*** to continue the use after the ordinance takes effect." [emphasis added] *City of*

Okoboji v. Okoboji Barz, Inc., 746 N.W.2d 56, 60 (Iowa 2008). An established nonconforming use runs with the land, and a change in ownership will not destroy the right to continue the use. *City of Clear Lake v. Kramer*, 789 N.W.2d 165 (Table), 2010 WL 3157759 (Iowa Ct. App. 2010).

"The vested rights concept is a part of the balancing of the respective legitimate interests of the private property owner against those of the general public, keeping in mind that the legitimate expenditures in connection with the use of an affected tract of land or in a business conducted on it, before the imposition of the regulation, may create a property right which cannot be arbitrarily interfered with or taken away without just compensation. [citations omitted]." *Kasparek v. Johnson County Bd. of Health*, 288 N.W.2d 511, 518 (Iowa 1980).

Vested nonconforming use rights cannot be revoked by a city merely because of insubstantial changes that do not change the primary use of the premises. An intensification of a nonconforming use is permissible so long as the nature and character of the use is unchanged and substantially the same facilities are used. *See City of Central City v. Knowlton*, 265 N.W.2d 749, 754 (Iowa 1978); *Jewell Junction v. Cunningham*, 439 N.W.2d 183,

186 (Iowa 1989); *City of Okoboji v. Okoboji Barz, Inc.*, 830 N.W.2d 300, 304 (Iowa 2013).

The grandfathered right of the owner to continue a nonconforming use is subject to the right of a city to protect against a nuisance that substantially poses an unsafe hazard to the persons in possession or others. *Kasparek*, 288 N.W.2d at 519; *Easter Lake Estates, Inc.*, 444 N.W.2d at 76. But the safety issue must be extremely substantial, and a city may not assert safety as a mere sham for taking a property owner's constitutionally protected grandfathered nonconforming use. "Only ***necessity*** justifies the exercise of police power to take private property without compensation." [emphasis added] *Kasparek*, 288 N.W.2d at 518.

In the case at hand, the only possible purpose that could justify the destruction of the subject Mobile Home Park is the ***necessity to abate an extremely substantial unsafe nuisance***. An action by any court to take away a property owner's constitutional right to continue a nonconforming use is of tremendous significance. I have practiced zoning law for more than 40 years. It has long been a concern of mine that a city might adopt a dishonest strategy to assert false safety concerns as a sham pretext to induce a naïve court into rendering a ruling to destroy a nonconforming use and deprive the

owner of his constitutional protection. No city in Iowa has been so bold over the past 40 years until now.

Previous city actions to terminate nonconforming uses for asserted safety purposes have involved single structures that had fallen into such an unsafe state of disrepair as to present a real safety hazard to the occupants and other persons. This case involves an assertion by a city that not just a single structure, but an entire neighborhood of 30 mobile homes is so dangerous and hazardous as to justify its destruction by the court.

The precedent set by the Court of Appeals is tremendously dangerous. The layout of the Mobile Home Park in this case is essentially the same as the layouts of many other mobile home parks throughout the state. If this decision is allowed to stand, mobile home parks throughout the state will face similar city actions seeking their destruction on asserted safety grounds.

D. THE SUPREME COURT SHOULD NOT GIVE BLIND DEFERENCE TO THE CITY'S SHAM ASSERTION OF A PUBLIC SAFETY PURPOSE.

In analyzing the Court of Appeals Opinion, one of the many errors made was the Court's blind deference to the City's asserted purpose that the mobile home park was a danger to public safety. The City's asserted public safety purpose is a dishonest sham. The sham nature of the City's asserted

justification for destroying the 30 mobile homes is so completely transparent that it is incredible that any court would buy into it.

The Court of Appeals irrational, blind and unquestioning deference to the City's asserted public safety purpose was in all probability brought about by the Iowa Supreme Court's policy that, for purposes of judicial review, a city council's purposes for enacting resolutions and ordinances must be ascertained solely by reference to the text of the particular resolution or ordinance and any official statements of intent relating thereto. The Iowa Supreme Court has repeatedly announced its policy that a city council speaks only through its resolutions and ordinances, and that individual city council members cannot be interrogated with regard to their opinions of the reasons supporting their resolutions and ordinances.

It is a mistake to apply this rule too strictly. The issue is one of true fully developed facts supported by all the relevant evidence—and facts that are not fully developed and that are not completely true because of the failure to consider important evidence that contradicts those facts. In my 40 years of experience as an attorney, I have been frustrated many times by rulings by Iowa courts that are based on "judicial facts" that are not fully developed because of the courts' practice to limit their factual inquiry to only a city council's officially stated purposes. There is often extremely

relevant, and often very obvious, other evidence that rebuts the city's officially stated purposes.

When the Supreme Court chooses willfully to not consider all the relevant evidence, it does injustice. Justice is based on making the best judicial decision possible. The best judicial decision possible can only be made after consideration of ALL the relevant evidence. The case at hand is the perfect example of an extremely unjustice decision based on blind, unquestioning deference to an official statement asserting a legitimate purpose, under circumstances where the asserted legitimate purpose was nothing more than a dishonest sham to cover an illegitimate true purpose.

Judges are officers of the court, but they also are human beings who live in their communities, the same as any other human beings. As responsible members of the community, judges should be aware of what is going on in their community. As part of the Des Moines community, the Justices of the Supreme Court should be well aware of the tremendous real estate development that is taking place in the City.

The Court should take judicial notice of the fact that the City is pursuing a policy of gentrification, a policy for targeting under-developed real estate and utilizing the tools available to cause the real estate to be

redeveloped to its highest and best use. The key to a successful gentrification program is the strategy for using the best tools available.

For redevelopment of large areas of land, Iowa Code chapter 403 provides the tremendously effective tool of urban renewal. Urban renewal provides cities with the means to designate and assemble a large urban renewal area through involuntary acquisition of separately owned parcels. If urban renewal was not available, the city often would not be able to voluntarily negotiate for purchase of all the parcels needed to assemble the entire redevelopment area. But urban renewal comes at a price. A city cannot constitutionally take any private owner's property without paying him just compensation.

The Mobile Home Park is a target of the City's gentrification program. In Appellee's Brief, the City Attorney branded Mark Ogden as a "slumlord." The word "slumlord" normally is an extremely mean-spirited term used to described certain owners of residential apartment buildings. In the present case, the 30 mobile homes are owned by the residents, not by Mark Ogden. Mark Ogden merely owns the land on which the mobile homes are located. It is difficult to understand what the City Attorney was thinking when he slandered Mark Ogden as being a "slumlord." However, for present purposes, use of the term "slumlord" is absolute proof that the City considers

the Mobile Home Park as an extremely unsightly and under-developed tract of real estate.

Because of the City's determination that the Mobile Home Park is an extremely unsightly and under-developed tract of real estate, the tool of urban renewal was readily available to the City to cause the redevelopment of the tract to a higher and better use. Why did the City not simply use the standard urban renewal tool?

The answer, of course, is money. If the City had designated the Mobile Home Park as an urban renewal area, (a) the City would have been required to pay Mark Ogden just compensation for the value of the land, (b) the City would have been required to pay the owners of the 30 mobile homes just compensation for the value of their mobile homes; and (c) the City would have been required to pay relocation benefits as required by law. The costs associated with pursuing standard urban renewal procedures obviously were more than the City Council was willing to pay.

This left the City Council with a dilemma. The City Council wanted to avoid paying urban renewal just compensation, but it also wanted to kick out Mark Ogden and the residents of 30 mobile homes. How was that possible?

The City authorities came up with an ingenious strategy: "Since the Mobile Home Park is a long standing nonconforming use, it does not comply with a number of current City zoning regulations. These current zoning regulations are intended in part to promote safety. So, let's file a lawsuit for absolute discontinuance of the mobile home park on the asserted purpose of the need to protect the safety of the residents." What a great idea! "The court will treat the case summarily as a simple nuisance action and will order the destruction of the nuisance—and the best part of it all is that the City does not need to pay one dime!" WOW!!!

But somebody with the City said "Hold your horses; how can we seek relief in a lawsuit on the sole asserted purpose of protecting the residents of the 30 mobile homes if the ultimate relief requested really is to kick all of those people out of their homes and destroy all of their homes, all without paying them one dime?" That is a really good question, isn't it?

The City authorities had an answer for that one, too: "Even though most of the safety allegations relate to the mobile homes owned by the residents, and not to the bare land owned by Mark Ogden, let's file a petition that names only Mark Ogden as the defendant. When we file a petition alleging unsafe conditions in an apartment building, we only name the building owner; we do not name as defendants the tenants in each of the

apartment units. We can count on the trial court being too ignorant to understand that our goal is to take people's homes without affording them a right to a hearing. Most of the owners and residents of the 30 mobile homes are Latinos who do not speak English. If we file the action without naming them as parties and without providing them with any notice as to what is going on, we can rush to judgment, get an order to kick them out—AND THEY WILL NEVER KNOW WHAT HIT THEM!" Again, WOW!!!

While the foregoing is my reconstruction of the City's thought processes, there is no "smoking gun" admissible evidence to prove any of it, only overwhelming circumstantial evidence. This is the only explanation that makes any rational sense to explain the City's strategy and intentions.

The most compelling circumstantial evidence to support my hypothesis is the way the City dealt with—or more accurately—did NOT deal with the mobile home owners and residents. The City asserted that the Mobile Home Park should be closed because it is unsafe. If it is unsafe, who are the victims of the unsafe conditions? Of course, the "victims" of the unsafe conditions would be the mobile home residents. Therefore, it logically follows that the first people the City enforcement officials would have been expected to contact to discuss unsafe conditions would have been alleged victims, the residents.

Far from contacting the residents, the City went to great pains to make sure that the residents were not informed about the City's intentions. At trial, one resident had the initiative and courage to appear and offer her testimony. Then both the District Court and the Court of Appeals incredibly ruled to exclude her testimony because she was not disclosed in advance, and because her testimony was irrelevant. IRRELEVANT!!! Both Courts' rulings on this point deserve condemnation. Under the Constitution, we all have the right to a place to live. The residents of the 30 mobile homes may be poor and disenfranchised, BUT I WOULD CHALLENGE ANY COURT that denies them the right to testify at the very hearing at which the trial court is prepared to throw them out of their homes.

If this Court wonders why civil disobedience is being spoken of more and more in this country. If this Court wonders why riots like Ferguson, Missouri occur, or why organizations like Black Lives Matter are created. Or why courts are hated by so many poor and disenfranchised human beings. Look no further than the appalling denial of justice in this case!

Finally, I want to return to the discussion of judicial facts and the Supreme Court's policy to not look for City Council intent beyond the text of its official instruments. This case compels the Court to relax that strict standard and consider the obvious true purposes behind the City's actions.

As authority for my plea to the Court, I cite *Aziz v. Trump*, 2017 U.S. Dist. LEXIS 14818 (E.D. Va, Jan. 28, 2017), and *Washington v. Trump*, 847 F.3d 1151 (9th Cir., Wash. 2017).

These two federal cases involved President Trump's initial executive order preventing Muslims from entering this country. These cases involved the constitutional standard of review applicable to government exercise of police power to protect public safety. The courts acknowledged that courts may not give unquestioning deference to a government exercise of police power that impacts constitutional due process guarantees. If the exercise is based on an asserted purpose that is an apparent sham, or is secondary relative to a substantial adverse impact on a person's due process rights, a court must declare the exercise unconstitutional.

In these two federal cases, the federal courts exercised tremendous initiative and courage. The courts found the outside evidence to be clear and overwhelming that the President of the United States was a liar and that his asserted purpose was a dishonest sham. The Supreme Court should follow the federal courts and exercise the courage to go beyond the City's asserted purpose and take judicial notice of the true facts that are clear and self-evident.

E. ERRORS BY COURT OF APPEALS

As discussed above, the sole issue in this case is whether the City's asserted safety purpose is sufficient to justify the District Court's Ruling to terminate the use of the subject premises as a mobile home park. The Court of Appeals ruled that the asserted safety purpose was sufficient. The Court of Appeals erred very badly.

On page 12 of its Opinion, the Court erred by concluding that: "Although this mobile home park has not changed in size or use, the record demonstrates it has grown within its borders in the numbers and locations of structures attached to the mobile homes resulting in a narrowing of open space on the roadways and between the homes. After reviewing the record, we hold the district court did no err in finding these changes over a half century have enhanced and intensified the non-conforming use to the point where it is a danger to life and property." There was no expert testimony or other evidence in the record to support this extreme conclusion. The only expert to testify on the matter was City Fire Marshall Jonathan Lund, and his testimony was to the contrary. Mr. Lund's testimony was conspicuous by his refusal to opine that there were any existing conditions in the Park that were "a danger to life and property." Even the Court grudgingly acknowledged on page 12 of its Opinion that "***Lund's testimony did not explicitly opine the park is dangerous to life and property***."

On page 12 of its Opinion, the Court erred by concluding that "the record depicts the layout on the property creates a dangerous fire hazard." There was no expert testimony or other evidence in the record to support this conclusion. The only expert to testify on this issue was Fire Marshall Lund, and he certainly did not opine that the layout "creates a dangerous fire hazard."

On page 12 of its Opinion, the Court erred by concluding that the 10-foot wide access road was too narrow to allow the Fire Department to respond effectively in the event of a fire. There was no expert testimony or other evidence in the record to support this conclusion. The only expert to testify on this issue was Fire Marshall Lund, who testified only that the current standard is for 20-foot wide access roads. However, he certainly did not testify that the Park's 10-foot road presented a dangerous problem to fire truck access.

On page 13 of its Opinion, the Court erred by concluding that "Ogden's failure to respond to the ten violations listed in the 2014 notice leaves no choice in the face of the potential for loss of life and property." Once again, there was no expert testimony that would indicate that any of the ten zoning violations posed a threat to "the loss of life and property." The ten violations were violations of the current regulations of the Zoning

Ordinance. The Court previously acknowledged that the Mobile Home Park was a grandfathered nonconforming use. A nonconforming use, by its very definition, is a use that does not comply with current zoning regulations. The Park was declared a legal nonconforming use by the 1955 Certificate of Occupancy and is entitled to continue as such without being required to be brought into compliance with later zoning enactments.

Finally, on page 13 of its Opinion, the Court erred in its final conclusion that: "The present congestion and crowding between structures and narrowing the roadway changes the nature and character of the 1955 non-conforming use and presents a danger to residents and neighbors of the park." Once again, there was no expert testimony that the cited conditions present "a danger to residents and neighbors of the park." Of course, if there had been a danger to residents of the Park, one would have expected testimony from the residents to discuss that issue, but as we all know, the City adamantly opposed any participation of the residents in the litigation.

On pages 14 and 15, the Court erred by concluding that the "district court did not err in holding Ogden's equitable estoppel defense fails.

Ironically, the Court of Appeals decision to throw 30 families out of their homes, without any expert testimony that such extreme action was justified by a clear and present danger, is directly contrary to the judicial

review standards enunciated by the same Court in its recent nuisance abatement decision in *City of Monroe v. Nichol*, 2017 Iowa App. LEXIS 448, No. 16-1155 (Iowa Ct. App. May 3, 2017).

In *Nichol*, the Court analyzed the authority of a city to abate public nuisances. In *Nichol*, the court dealt with the use of police power to enable the city to take title to a single nuisance building under circumstances where the owners had willfully abandoned the property, and refused to respond to repeated demands by the city to abate numerous safety code violations, to pay property taxes, to provide utilities to the property. In *Nichol*, the Court was far more protective of the constitutional rights of the absent owner of a single abandoned house with a long history safety code violations than the Court was in this case involved the displacement of 30 families from their homes with no history of any safety code violations. The Court declared that a city may not constitutionally deprive a property owner of the use and enjoyment of his property, unless the means for accomplishing the abatement of a nuisance are ***not unduly oppressive upon individuals***, and are ***narrowly tailored to accomplish the asserted public safety purpose***. In determining whether a regulation is reasonable, the Court enunciated that consideration must be give to the ***nature of the menace against which it will protect***, the ***availability and effectiveness of other less drastic protective steps***, and the ***loss which***

individuals will suffer from imposition of the regulation. In the case at hand, the Court apparently completely forgot all about the reasonable standards it enunciated in *Nichol*.

Having gone through the Court's Opinion and pointed out the errors made by the Court making conclusions of unsafe conditions that were completely unsupported by expert testimony, it remains to provide the Supreme Court with the following list of the conditions in the Park that were actually proven to exist by the undisputed evidence:

1. The subject real estate has been used as a place for residential mobile homes for the past 77 years;
2. The information provided by the County Assessor states that 39 mobile home pads were constructed on the real estate in 1939;
3. There presently are 30 mobile homes located on 30 of the 39 original mobile home pads; there are no mobile homes located at any location other than on one of the original pads; and because all mobile homes are located on the original pads, the distances between the individual mobile homes are no closer than they have ever been;

4. Each mobile home is a separate structure that meets all safety code requirements for occupancy as a residential dwelling (This may be the single most important material fact. ***Never before has the City brought a nuisance action against a dwelling that did not have safety code violations!***);

5. Some of the mobile home owners have added enclosed porches to their mobile homes, and the City has never cited any of these owners for violating any code requirements based on these enclosed porches;

6. The driveway on the real estate has remained in the same location during the entire period of time the premises have been used as a mobile home park, and the City Fire Marshall has never cited the premises in regard to any perceived problem with access to the premises by fire trucks (This may be the second most important material fact.);

7. During the past 77 years, there is no record of any fires within the Mobile Home Park;

8. During the past 77 years, there is no record of any accidents or other safety incidents within the Mobile Home Park;

9. During the past 77 years, there is no record of the issuance by the City of any notices for clean-up of any asserted junk or debris within the Mobile Home Park.

10. During the past 77 years, there is no record of any lawsuits instituted by the City or any other governmental authority relating to any fire code, building code, zoning ordinance or other violations of any other legal requirements within the Mobile Home Park;

11. Within the past 77 years, there is no record of any complaints being filed with the City by any individuals with regard to any problems associated with the Mobile Home Park;

12. The only "complaint" filed with City staff was a City Council directive, just prior to the filing of this lawsuit, ordering the Zoning Enforcement Officer to pursue action against the use of the premises as a nonconforming use;

13. Within the past 77 years, there is no record that the City had issued any citations or notices of violation relating to any fire code, building code, zoning ordinance or other violations of any other legal requirements within the Mobile Home Park, until City Zoning Officer Su Ann Donovan addressed an August 5, 2014 letter to Mr. Ogden stating that she believed the Mobile Home Park may to be in violation of current City zoning requirements;

14. On March 7, 1955, a Certificate of Occupancy was issued by the City's zoning and building officer certifying that the premises were then being legally operated as a nonconforming use under City zoning regulations [App. 87];

15. On July 31, 2003, M. Joseph Bohlke, the City's Deputy Zoning Enforcement Officer, delivered to the premises owner a written letter confirming that the March 7, 1955 Certificate of Occupancy was then in existence establishing the existing mobile home park as a legal nonconforming use under City zoning regulations [App. 104];

16. Prior to filing this action, the City never informed any of the owners or residents of the 30 mobile homes that the City believed there to be any legal violations or that the City desired to close the Mobile Home Park;

17. While the 30 mobile homes are owned by the residents, the residents are very poor, and unable to pay to remove their mobile homes from the premises and transport them for relocation to some other location (In support of this fact, see the Brief of Amici Curiae filed herein on behalf of eight of the mobile home residents); and

18. If the decision of the Court of Appeals is allowed to stand, the City Attorney has asserted that the City will expect Mr. Ogden to pay all the costs associated with removing the abandoned 30 mobile homes from the Park, estimated to be more than $100,000.

F. INCORPORATION BY REFERENCE OF APPELLANT'S BRIEF AND REPLY BRIEF

The Appellant hereby incorporates into this Brief all of the matters and arguments set forth in the Appellant's Brief and the Appellant's Reply Brief on file herein.

G. CONCLUSION

The Supreme Court should grant further review of this appeal. The Court of Appeals erred by not ruling that the current use of the premises as a mobile home park is a legal nonconforming use and has been since the issuance of the Certificate of Occupancy on March 7, 1955, and that the City is barred from obtaining an injunctive order to terminate the use.

As stated by Chief Judge Danilson at the conclusion of his separate opinion (concurring in part and dissenting in part): "Without any prior actions taken by the City against Ogden for prior violations, the record is markedly bare of evidence to show a substantial injury or damage will occur absent an injunction or that no adequate remedy at law is available."

Alternatively, even if the March 7, 1955 Certificate of Occupancy was found not to conclusively establish the vested right to continue the mobile home park as a legal nonconforming use, the Court of Appeals erred by not declaring that the City is barred by equitable estoppel from obtaining an injunctive order to terminate the use 61 years after the issuance of the Certificate of Occupancy.

The Appellant hereby incorporates into this Brief all of the matters and arguments set forth in the Appellant's Brief and the Appellant's Reply Brief on file herein.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT
MARK OGDEN

NOTICE OF ELECTRONIC FILING

Notice of Electronic Filing is sent through the electronic document management system to the Clerk of the Iowa Supreme Court and to all registered filers for the within case.

/s/ James E. Nervig

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Brief contains 5,504 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.

6.903(1)(f), because the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2007 edition of Microsoft Word in 14 point font plain style.

/s/ James E. Nervig

IN THE COURT OF APPEALS OF IOWA

No. 16-1080
Filed June 7, 2017

CITY OF DES MOINES, IOWA,
Plaintiff-Appellee,

vs.

MARK OGDEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert B. Hanson, Judge.

Mark Ogden, a property owner, appeals from the district court's findings that use of his property as a mobile home park is a danger to the safety of life and property, the park has exceeded its previous nonconforming use, and the court's injunction and order to cease use of the property as a mobile home park. Because the record supports the findings of the district court and because Ogden has made no effort to mitigate the violations documented by the City, we affirm.

AFFIRMED.

James E. Nervig of Brick Gentry P.C., West Des Moines, for appellant.

Luke DeSmet, Assistant City Attorney, Des Moines, for appellee.

Jessica J. Taylor and Laura Jontz, Iowa Legal Aid, for amici curiae.

Heard by Danilson, C.J., and Potterfield and Bower, JJ.

POTTERFIELD, Judge.

Mark Ogden appeals the district court's order enjoining the continued nonconforming use of Ogden's property as a mobile home park. He claims the district court erred in determining the land use expanded beyond its previously authorized nonconforming use and revocation of the use is necessary for the safety of life or property. He also claims the district court erred in determining equitable estoppel does not bar the injunction. Finally, he claims the district court abused its discretion in excluding Gloria Lang's testimony. We affirm.

I. Background Facts and Proceedings.

Ogden owns a tract of land situated on the south side of Des Moines where he operates a mobile home park (the "property"). Ogden purchased the property in 2013, but he has been involved in the maintenance and upkeep of the park since his uncle purchased the property around 1975, and he started actively managing the park in 1999 due to his uncle's declining health. The property sits on the northwest corner of Indianola Avenue and Park Avenue and contains approximately thirty-nine mobile home pads that are leased to park residents. Approximately half of the pads and homes are situated on the outside perimeter of the property. A narrow, u-shaped access road circles the inside of the property and separates the interior homes from the perimeter homes.

The record does not reveal the entire historical use of the property. Testimony and photographs depict the property was used as a tourist camp in 1947. Sometime shortly thereafter, the use of the property changed to a mobile home park. In 1955, the City of Des Moines issued a certificate of occupancy allowing the operation of a trailer court on the property contrary to the 1953 Des

Moines zoning ordinances, which prohibited the use of mobile home parks. A 1963 aerial photograph of the property depicts permanent homes that are in close proximity to each other with additional structures attached to the homes. Nothing else in the record describes the condition of the property in 1963.

More recent pictures of the property depict a congested, dilapidated, and hazardous jumble of structures. Many of the mobile homes are within feet of each other based on the addition of porches, decks, and living space. Residents park cars throughout the property narrowing portions of the already inadequate access road. Bulk trash items—such as tires, boats, and storage bins—are littered throughout the property. Grills, fences, gardens, and children's toys also crowd the property.

The record does not indicate the city took any action against the property after the certificate of occupancy was issued in 1955 until 2003. In 2003, Richard Clark—then owner of the park—was allegedly operating portions of the property as an auto dealership. The City of Des Moines issued a letter informing the owner the 1955 certificate of occupancy legitimized the use of the land as a mobile home park but did not authorize the park's use as an auto dealership. The city did not issue any additional warnings or citations regarding the mobile home use until 2014.

On August 5, 2014, SuAnn Donovan, neighborhood inspection zoning administrator for the city, notified Ogden by letter explaining the "park has numerous violations of municipal zoning codes that were in place at the time the land was converted to a mobile home park." The city alleged the following violations of the 1955 Des Moines Municipal Code: (1) failure to provide a thirty-

five-foot set-back from Park Avenue; (2) failure to provide a twelve-foot set-back from Indianola Road; (3) failure to provide a forty-foot setback along the lot line running north from Park Avenue; (4) failure to provide a fifteen-foot set-back along the lot line running west from Indianola Road; (5) failure to supply 1,200 square feet of lot area per mobile home (6) failure to maintain a twenty-foot unobstructed driveway accessible to the public street, properly maintained with an all-weather surface, marked, and lighted; (7) failure to maintain twelve-foot clearance between trailers; (8) failure to provide a two-foot walk way between trailers to the public street; (9) failure to provide fire extinguishers in good working order for every twenty-five trailer spaces located not further than two hundred feet from each trailer space; and (10) additions to the trailers other than porches or entry ways were prohibited from reducing the clearance between trailers or other additions below eleven feet. The letter further warned the violations pose a threat to the health and safety of the occupants and the violations must be brought into compliance with the applicable code to prevent further legal action. Ogden did not take any action to remedy the violations.

In October 2014, the city filed a petition seeking an injunction against the property owner for the above listed violations. At trial, the Des Moines Fire Marshall, Jonathan Lund, testified for the city. He stated the "construction of a mobile home is inherently a little bit more dangerous in the sense that they typically use smaller dimensional lumber," which "can lead to rapid progression of fire." He also testified that the close proximity of the mobile homes creates an exposure hazard, "which leads to more fires." Lund testified the ten-foot access road would make it difficult for firefighters to respond to a fire. He explained:

> [W]e require 20-foot-wide fire access roads. That facilitates us positioning a fire apparatus in front of the building and still being able to maneuver another fire apparatus around that engine or truck. . . . Anytime in fighting a fire access is paramount. We have to be able to get there, deploy hose lines within a reasonable distance of the structure to do our job effectively.

Ogden testified about the history and layout of the property and various interactions he had with city employees regarding ordinance violations.[1] Gloria Lang, park resident, also testified, contingent on the court's ruling on the city's objections. Lang stated she did not interact with the city regarding her mobile home and that she would have difficulty relocating should the property cease use as a mobile home park. The city objected to the testimony on the grounds Ogden did not disclose Lang as a witness until the morning of trial and the testimony is irrelevant to the zoning issue at hand.

The court issued its ruling on the evidentiary issues presented at trial in its final order. Regarding Lang's testimony, the court held, "[B]ecause Ms. Lang was not disclosed as a witness until the morning of the trial and her testimony was irrelevant to zoning issues, the objection is sustained and her testimony is excluded." Regarding the use requirements, the court held:

> [T]he 1955 Certificate of Occupancy validly established a vested right in a nonconforming use as a trailer court because: (1) the Certificate acknowledges the use as at least partially nonconforming; and (2) the occupancy permit statute required an application and proof that the nonconforming use did not violate the required City ordinances; and (3) the City would not have issued the certificate had compliance in some capacity not been present. Thus, beginning in 1955, Ogden had a vested right to operate Oak Hill as a mobile home park subject to: (1) the language of section

[1] The city objected to this testimony, as Ogden failed during discovery to disclose his previous interactions with the city. In its order, the court held, "[B]ecause the City inquired of any statements made by City employees during discovery and Ogden did not identify any of these statements at that time, the objection is sustained and the testimony is excluded. This evidentiary ruling is not part of Ogden's appeal."

> 2A-49, which allows "a discontinuance . . . necessary for the safety of life or property;" and (2) the boundaries of the nature and character of the legal nonconforming use as it existed in 1955 (which is best represented by the 1963 aerial photographs).
>
> Second, the Court holds that a discontinuance of the nonconforming use under the 1955 Certificate of Occupancy is necessary for the safety of life or property. The 1963 aerial photographs demonstrate that Oak Hill was in violation of many of the contemporaneous zoning ordinances, but Oak Hill of 1963 is far less congested than Oak Hill of 2015. As detailed in the Court's Findings of Fact, conditions at Oak Hill deteriorated markedly between 1963 and 2006 (when the City began photographing Oak Hill at ground level). Now, much of the open space visible in the 1963 photos is filled with the detritus of life: vehicles, outdoor recreational equipment, garbage bins, makeshift gardens, fencing, and crudely constructed additions to the mobile homes. The U-shaped road that runs through Oak Hill is in poor repair, absent markings or well-defined borders. There is no evidence of adequate fire prevention or fighting equipment. The City stated in its original letter regarding this action that the zoning regulations in 1955 were aimed at preserving the health and safety of Oak Hill and its occupants. The occupancy permit statute states that discontinuance of the permit is allowed if the safety of life or property is threatened. Oak Hill is so congested and cluttered as to impede the ability of first responders to adequately address common urban dangers, such as fires and situations requiring police involvement.

The court also held that Ogden's "use of [the] property has intensified beyond acceptable limitations" because the conditions "pose a real threat in the event of an emergency."

Ogden did not file a rule 1.904(2) motion to enlarge or amend the district court findings. Ogden appealed the district court's ruling. Our supreme court granted permission for the filing of amicus curiae brief by eight residents of Oak Hill Mobile Home Park.[2]

[2] Amici curiae argue any injunction against the property's use as a mobile home park will lead to its residents' homelessness and the evidence in the record was insufficient to establish safety and health concerns to its residents and the surrounding community. We address the insufficiency of evidence argument in the discussion of Ogden's appeal.

II. Standard of Review.

We base our standard of review of an appeal on the manner in which it was tried at the district court. *Ernst v. Johnson Cty.*, 522 N.W.2d 599, 602 (Iowa 1994). "Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections." *Id.* Although the underlying action seeks an injunction, the district court made multiple evidentiary rulings. Thus, we review for correction of errors at law.

We review discovery sanctions and evidentiary rulings for an abuse of discretion. *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 385 (Iowa 2012) (explaining standard of review for discovery sanctions); *Williams v. Hedican*, 561 N.W.2d 817, 822 (Iowa 1997) (explaining standard of review for evidentiary rulings).

III. Discussion.

Ogden argues the district court erred by concluding (1) a discontinuance of the nonconforming use is necessary for the safety of life or property and (2) any changes to the property are unlawful expansions of the existing nonconforming use.[3] Ogden also argues equitable estoppel prevents the city

[3] We also note that during oral arguments, appellant urged us to consider *City of Monroe v. Nicol* in support of his argument that the district court's order should be reversed. 16-1155, 2017 WL 1735875 (Iowa Ct. App. May 3, 2017). In *Nicol*, the city assumed title to an abandoned property pursuant to Iowa Code section 657A.10A(5) (2016). *Id.* at *1. The appellant property-owner specifically challenged the constitutionality of the statute authorizing the city to assume title, arguing it was an unconstitutional taking contrary to the Iowa and United States Constitutions. *Id.* A panel of our court affirmed the district court's order transferring title to the city. *Id.* at 2. We are uncertain how this case supports the appellant's argument. Unlike the facts presented in *Nicol*, here Ogden retains title to his property, and no action was taken by the city under section 657A.10A(5). Nor did Ogden challenge the constitutionality of the regulation used by the

from obtaining an injunction. The city argues Ogden is not entitled to continuing nonconforming use occupancy because the property now has deteriorated so that it is in violation of multiple ordinances since the certificate of occupancy was issued. The city also argues the nonconforming use can be revoked based on health and safety concerns.

A. Error Preservation—Unconstitutional Taking.

The city argues Ogden failed to preserve error on the issue of an unconstitutional taking because it was not presented to the district court. Ogden argues the issue was raised in his proposed ruling submitted to the district court. Ogden failed to develop his argument regarding a takings claim at the district level.[4] While Ogden did mention "takings" in his proposed rulings as what appears to be background material for land-use law, the trial court did not rule on any takings claims. Ogden also failed to file a rule 1.904(2) motion to enlarge the trial court's findings in order to address the takings issue. To the extent Ogden raises an unconstitutional takings claim in his appellate brief, he has not preserved error. *See Homan v. Branstad*, 887 N.W.2d 153, 161 (Iowa 2016) ("[W]hen a party has presented an issue, claim, or legal theory and the district

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city to revoke Ogden's nonconforming use. The analysis and legal issues in *Nicol* are unrelated to the issue presented here: whether Ogden exceeded the nonconforming use of his property.

[4] Ogden appears to argue the actions of the city amounted to a regulatory taking. The Supreme Court explained land-use regulations "do not effect a taking requiring compensation if it substantially advances a legitimate state interest." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023–24 (1992); *see also Iowa Coal Min. Co. v. Monroe Cty.*, 555 N.W.2d 418, 431 (Iowa 1996) (discussing *Lucas*). The Court recognized two exceptions: "When the regulation (1) involves a permanent physical invasion of property or (2) denies the owner all economically beneficial or productive use of the land, the State must pay just compensation." *Lucas*, 505 U.S. at 1028–29. We note Ogden failed to develop these rules—or any argument supporting them—at the district court level.

court has failed to rule on it, a rule 1.904(2) motion is proper means by which to preserve error and request a ruling from the district court.").

B. Nonconforming Use.

Generally, "[a] nonconforming use of property is one that lawfully existed prior to the time a zoning ordinance was enacted or changed, and continues after the enactment of the ordinance even though the use fails to comply with the restrictions of the ordinance." *City of Okoboji v. Okoboji Barz, Inc.*, 746 N.W.2d 56, 60 (Iowa 2008). While a nonconforming use may continue until legally abandoned, "the nonconforming use cannot be enlarged or extended." *Id.* The purpose of a prohibition against expansion of a nonconforming use is to protect against the growth of "a pre-existing aggravation" that "survives as a matter of grace."[5] *Stan Moore Motors, Inc. v. Polk Cty. Bd. of Adjustment*, 209 N.W .2d 50, 53 (Iowa 1973). The Des Moines Municipal Code reflects this principle. It states, "Nothing in this division shall prevent the continuance of a nonconforming use as authorized, *unless a discontinuance is necessary for the safety of life or*

[5] Other jurisdictions generally disfavor the "establishment, continuance, and expansion" of nonconforming uses because of the conflict "with the objectives of comprehensive zoning." *See* Patricia E. Salkin, American Zoning Law § 12:7 (5th ed. 2017) (citing *Billups v. City of Birmingham*, 367 So. 2d 518 (Ala. Crim. App. 1978) ("The spirit and intention of the zoning laws is to restrict any increase of any nonconforming use."); *Hartley v. City of Colorado Springs*, 764 P.2d 1216 (Colo. 1988) ("Nonconforming uses are disfavored because they reduce the effectiveness of zoning ordinances, depress property values, and contribute to the growth of urban blight. Because of their undesirable effect on the community, nonconforming uses should be eliminated as speedily as possible. Accordingly, zoning provisions allowing nonconforming uses to continue should be strictly construed, and zoning provisions restricting nonconforming uses should be liberally construed."); *Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com'n*, 848 N.E.2d 285 (Ind. Ct. App. 2006) ("[T]he policy of zoning ordinances is to secure the gradual or eventual elimination of nonconforming uses and to restrict or diminish, rather than increase, such uses. Such policy embodied in a zoning ordinance is important to the trial court in determining the extent and character of changes that will not destroy the character of a nonconforming use.")).

property." Des Moines, Iowa, Zoning Ordinance, div. 5 § 134-155(a) (2014) (emphasis added).[6]

Still, an intensification of nonconforming use does not automatically revoke the owner's ability to continue the nonconforming use, and "[l]andowners are given some latitude . . . and may change the original nonconforming use 'if the changes are not substantial and do not impact adversely on the neighborhood.'" *Okoboji*, 746 N.W.2d at 60 (alteration in original) (quoting *Perkins v. Madison Cty.*, 613 N.W.2d 264, 270 (Iowa 2000)). For example, the nonconforming use of a care facility for disabled persons did not cease when the patient's disabilities changed "from impaired mental functions through aging processes to those caused by mental illness," which violated another ordinance under the applicable zoning regulation prohibiting property use for "persons suffering from a mental sickness, disease, disorder or ailment." *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 184–85, 187 (Iowa 1989). Similarly, a restaurant operating under a legal nonconforming use did not lose its nonconforming status when it decided to sell alcohol on the premises. *See Okoboji*, 746 N.W.2d at 63–64.

On the other hand, expanding a marina that sold beer for off-premises consumption to a bar that hosts activities such as karaoke, live music, hog roasting, and on-site parties unlawfully expanded the nature and character of the nonconforming use. *See City of Okoboji, Iowa v. Okoboji Barz, Inc.*, 717 N.W.2d

[6] The relevant Des Moines code section at the time the certificate of occupancy was issued also provides for an exception to continuing nonconforming use when "discontinuance is necessary for the safety of life or property." Des Moines, Iowa, Zoning Ordinance, part XX § 2A-49 (1953).

310, 316 (Iowa 2006). Adverse effects on the neighborhood can also exceed the scope of nonconforming use, such as an impact on public services or increased traffic. *See Jewell Junction*, 439 N.W.2d at 187. Our supreme court has not addressed whether the addition of structures or expansion of homes in a mobile home park constitutes an unlawful expansion of a non-conforming use.

Other jurisdictions, however, determined replacing existing mobile homes with larger mobile homes in violation of setback requirements is an unlawful expansion of the property's nonconforming use. *See Kosciusko Cty. Bd. of Zoning App. v. Smith*, 724 N.E.2d 279, 281 (Ind. Ct. App. 2000) (holding zoning ordinance that prohibits expansion of nonconforming uses requires owner to conform to zoning ordinance or request a variance); *Wiltzius v. Zoning Bd. of App. of Town of New Milford*, 940 A.2d 892, 910 (Conn. App. Ct. 2008). These jurisdictions relied on the municipal code language similar to the language expressed in the Des Moines municipal code to support the city's intent to curtail nonconforming uses.

In order to resolve a zoning violation when a nonconforming use is asserted by the property owner, our courts engage in the following burden-shifting analysis: (1) the city has the burden of proving a violation of the ordinance; (2) Ogden "has the burden [to] establish the lawful and continued existence of the use"; and (3) "once the preexisting use has been established by a preponderance of the evidence, the burden is on the city to prove a violation of the ordinance by exceeding the established nonconforming use." *Jewell*, 439 N.W.2d at 186. The parties do not dispute that Ogden is in violation of multiple zoning ordinances. Nor do the parties dispute the 1955 certificate of occupancy

establishes lawful and continued existence of use. Thus, the remaining issue is whether the City has shown Ogden exceeded the nonconforming use established in 1955.

Although this mobile home park has not changed in size or use, the record demonstrates it has grown within its borders in the numbers and location of structures attached to the mobile homes resulting in a narrowing of open space on the roadways and between the homes. After reviewing the record, we hold the district court did not err in finding these changes over a half century have enhanced and intensified the non-conforming use to the point where it is a danger to life and property. First, the record depicts the layout on the property creates a dangerous fire hazard. Lund testified the positioning of the structures within the setback limitations "creates an exposure hazard for us, which leads to more fires." Lund explained the fire hazard is especially present in mobile homes because they are "inherently a little bit more dangerous in the sense that they typically use smaller dimensional lumber. . . . [I]t can lead to [a] rapid progression of fire." Lund also testified the crowded conditions and the narrow, ten-foot access road would inhibit the ability of the fire department to respond effectively:

> [W]e require 20-foot-wide fire access roads. That facilitates us positioning a fire apparatus in front of the building and still being able to maneuver another fire apparatus around that engine or truck. . . . Anytime in fighting a fire access is paramount. We have to be able to get there, deploy hose lines within a reasonable distance of the structure to do our job effectively.

Although Lund's testimony did not explicitly opine the park is dangerous to life and property, he clearly stated the congestion in the park would make it difficult

to contain a fire or even to position the firefighting equipment effectively. The congested conditions, large trash items, altered structures, and parked cars all pose a threat to the fire department's ability to protect life and property. Law enforcement and other public officials would face similar obstacles in providing public services to the property. The district court did not err in enjoining the nonconforming use to protect the "safety of life or property," as authorized by the applicable certificate of occupancy code. The absence of previous notices of violations from the City or the fire department does not justify the risk of tragedy to families living in the park in the event of an emergency. Ogden's failure to respond to the ten violations listed in the 2014 notice leaves no choice in the face of the potential for loss of life or property. Although our record does not expand on complaints by neighboring landowners, the zoning administrator testified, "[C]itizens have filed complaints."

For similar reasons, Ogden's use of the property is not a lawful intensification of an existing nonconforming use. The present congestion and crowding between structures and narrowing the roadway changes the nature and character of the 1955 non-conforming use and presents a danger to residents and neighbors of the park. *See Jewell Junction*, 439 N.W.2d at 187.

C. Evidentiary Issues.

Ogden next argues the court abused its discretion in declaring the testimony of Gloria Lang was inadmissible. He claims the district court erroneously based its determination on relevancy. The record, however, reflects an additional reason for the district court's evidentiary ruling. The district court excluded Lang's testimony as a discovery sanction because the witness was not

disclosed until the morning of trial *and* her testimony was irrelevant to zoning issues. The decision of the trial court to exclude witness testimony as a discovery sanction is discretionary and will not be reversed unless there has been an abuse of discretion. *Sullivan v. Chicago & N.W. Transp. Co.*, 326 N.W.2d 320, 324 (Iowa 1982) (holding district court's sanction of excluding a witness's testimony for party's failure to disclose a witness was appropriate and did not amount to an abuse of discretion). Failure to disclose a witness is a valid justification for a discovery sanction. *Id.* The district court did not abuse its discretion in excluding Lang's testimony because Ogden failed to disclose the witness until the day of trial.

D. Equitable Estoppel.

Ogden next argues equitable estoppel bars the city from enjoining the use of the mobile home park. "The doctrine of equitable estoppel is a common law doctrine preventing one party who has made certain representations from taking unfair advantage of another when the party making the representations changes its position to the prejudice of the party who relied upon the representations." *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 531 (Iowa 2015). Our supreme court has "consistently held equitable estoppel will not lie against a government agency except in exceptional circumstances." *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 163, 180 (Iowa 2006) (quoting *ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 606 (Iowa 2004)). "The 'exceptional circumstances' under which equitable estoppel will lie against the government include instances when, 'in addition to the traditional elements of estoppel, the party raising the estoppel proves affirmative misconduct or wrongful conduct by

the government or a government agent.'" *Fennely*, 728 N.W.2d at 180 (quoting 28 Am. Jur. 2d Estoppel and Waiver § 140, at 559 (2000) (holding a failure by an assessor to communicate with a property owner in order to obtain information regarding a tax assessment is not misconduct by the government)).

Ogden claims the city's 2003 letter confirming the property's nonconforming-use status and the city's failure to inform him of zoning violations amount to a representation that justifies estoppel. In order to prove estoppel, Ogden must demonstrate: "(1) a false representation or concealment of material fact by the city, (2) a lack of knowledge of the true facts by [Ogden], (3) the city's intention the representation be acted upon, and (4) reliance upon the representations by [Ogden] to their prejudice and injury." *City of Marshalltown v. Reyerson*, 535 N.W.2d 135, 137 (Iowa Ct. App. 1995) (citing *Incorporated City of Denison v. Clabaugh*, 306 N.W.2d 748, 754 (Iowa 1981)). Ogden's claim fails under the first element; the record does not support the city's failure to enforce the zoning ordinance amounts to a false representation or concealment of material fact. As indicated by testimony, the city does not notify property owners every time a zoning infraction occurs. Rather, the city operates on a complaint basis to trigger enforcement. The district court did not err in holding Ogden's equitable estoppel defense fails.

IV. Conclusion.

The district court properly granted the city's request for an injunction against Ogden's use of the property as a mobile home park. The city may revoke nonconforming use status for the "safety of life or property." Ogden also exceeded the valid nonconforming use by expanding the structures and reducing

the open space of the mobile home park in a manner that violated multiple city ordinances. Furthermore, the district court properly excluded Lang's testimony because Ogden failed to disclose the witness to the city until the morning of trial. Ogden also failed to prove misconduct by the city in order to succeed on his equitable estoppel claim.

AFFIRMED.

Bower, J., concurs; Danilson, C.J., partially dissents.

DANILSON, Chief Judge. (concurring in part and dissenting in part)

I concur with the majority's discussion on all issues except the issue concerning nonconforming use. In respect to the issue of an unconstitutional taking, I would only add that Ogden also did not plead a counterclaim or defense on the basis of a taking. I respectfully dissent in regard to the second issue.

I disagree with the majority affirmation of the district court conclusions that the mobile home park's current state exceeds the legal nonconforming use as it existed in 1955 and poses a threat to the safety of people or property at the mobile home park. I conclude the City has failed to prove both grounds.

The general principles related to nonconforming use of property were recited in *City of Okoboji v. Okoboji Barz Inc.*, 746 N.W.2d 56, 60 (Iowa 2008):

> A nonconforming use of property is one that lawfully existed prior to the time a zoning ordinance was enacted or changed, and continues after the enactment of the ordinance even though the use fails to comply with the restrictions of the ordinance. *Perkins v. Madison Cty.*, 613 N.W.2d 264, 270 (Iowa 2000). The prior use of the property essentially establishes a vested right to continue the use after the ordinance takes effect. *See Quality Refrigerated Servs. v. City of Spencer*, 586 N.W.2d 202, 206 (Iowa 1998). The nonconforming use is permitted to continue until legally abandoned. *Iowa Coal Mining Co. v. Monroe Cty.*, 555 N.W.2d 418, 430 (Iowa 1996). However, the nonconforming use cannot be enlarged or extended. *Stan Moore Motors, Inc. v. Polk Cty. Bd. of Adjustment*, 209 N.W.2d 50, 52 (Iowa 1973). This limiting principle is carved into the city ordinance at issue in this case. The ordinance expresses an intent "to permit . . . nonconformities to continue until they are removed, but not to encourage their survival," and provides "that nonconformities shall not be enlarged upon, expanded or extended, nor be used as grounds for adding other structures or uses prohibited elsewhere in the same district." Okoboji Zoning Ordinance art. IV, § 3. Nevertheless, the body of law governing nonconforming uses of property recognizes "[l]andowners are given some latitude . . . and may change the original nonconforming use 'if the changes are not substantial and do not impact adversely on the neighborhood.'" *Perkins*, 613

N.W.2d at 270 (citing *City of Jewell Junction v. Cunningham*, 439 N.W.2d 183, 186 (Iowa 1989)).

In 1955 the City of Des Moines gave its approval to the mobile home park's nonconforming use. As observed by the district court, the exact date when the mobile home park came into existence is unknown. The district court concluded it was sometime between 1947 and 1955. The City has no evidence of the condition of the park or the number of mobile homes in the park in 1955 when the certificate of nonconforming use was granted. The best evidence the City could muster was how the mobile home park existed in 1963. If the mobile home park had been expanded to, say, twice its size, perhaps reliance on its' status in 1963 might serve to meet the City's burden. But here, where the City admits there is no change in size and its use remains as a mobile home park, there is a failure of proof that the nonconforming use has been exceeded.

The district court noted the burden of proof lies first with the City to prove a violation of a zoning ordinance. *See Jewell Junction*, 439 N.W.2d at 186. Upon proof of a violation, the burden shifts to the defendant to establish "the lawful and continued existence of the use." *Id.* If the defendant is successful, the burden shifts back to the City to show the nonconforming use was exceeded. *See id.*

The district court concluded the City met its burden by showing violations of the zoning ordinance existing in 1955. And the majority has outlined ten such violations urged by the City. The City also contended the mobile home park was in violation of current zoning ordinances. The City conceded the 1955 certificate of nonconforming use satisfied the legality of the mobile home park's

nonconforming use.[7] I agree, but it might be better to say the use of the property does not comply with the zoning restrictions—because the noncompliance does not rise to the level of a violation as its use was legally authorized by the nonconforming-use certificate. *City of Okoboji*, 746 N.W.2d at 60.

The City thus had the burden to establish the "use" was exceeded. Ultimately, the district court concluded "the nature and character of the mobile home park have substantially changed." In reaching this conclusion, the district court relied upon the photos from 1963 compared to today's photo to find there was less open space due to congestion "filled with the detritus of life: vehicles, outdoor recreational equipment, garbage bins, makeshift gardens, fencing, and crudely constructed additions to the mobile homes." The district court also stated the road in the mobile home park was in disrepair, and police and fire would have difficulties responding to emergencies. According to the district court, such circumstances have caused an increase in danger and an intensification of the use beyond acceptable limitations. Notwithstanding the fact that at least thirty mobile homes are occupied in the mobile home park, the district court enjoined its operation and ordered the issuance of writs of removal within 180 days.

In respect to the alleged danger, apparently there have been no complaints levied by neighbors, no prior violations initiated by the City (except one unrelated to dangerous conditions), and the fire department has not initiated

[7] Notwithstanding its concession, the City argues the certificate of nonconforming use was not authorized and should not be given any validity, citing *Crow v. Board of Adjustment of Iowa City*, 288 N.W.2d 145 (Iowa 1939). However, because there is no evidence of exactly when the mobile home park came into existence and whether it was grandfathered in prior to the implementation of the zoning ordinances, and also the lack of any evidence the certificate was not properly authorized, there is no evidence to conclude the certificate is invalid.

any action because of any violations. The fire chief only testified that new developments are required to have a twenty-foot-wide access and that the space between mobile homes affects fire safety. The fire chief did not testify the mobile home park was dangerous.

The increase in vehicles from 1963 to today probably is not unlike any mobile home park. The mobile home park needs a thorough clean up and some parking restrictions but the City did not afford Ogden that option. I would conclude there has not been any substantial change in use or significant intensification of the use. Changes from the original nonconforming use have been marginal and the nature and character of the use is substantially unchanged. See *Jewell Junction*, 439 N.W.2d at 183 ("[I]ntensification of a nonconforming use is permissible *so long as the nature and character of the use is unchanged and substantially the same facilities are used*." (citation omitted)).

I would also conclude the City failed to show its need to enjoin the operation of the mobile home under these circumstances. Before granting an injunction to enforce a zoning ordinance the City must establish "(1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is no adequate legal remedy available." *City of Okoboji v. Parks*, 830 N.W.2d 300, 309 (Iowa 2013) (citations omitted). Without any prior actions taken by the City against Ogden for prior violations, the record is markedly bare of evidence to show a substantial injury or damage will occur absent an injunction or that no adequate remedy at law is available.

I would reverse.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	Case Title
16-1080	City of Des Moines v. Ogden

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